N CARRUPAIYA

v.

MBf PROPERTY SERVICES SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S7-22-104-2000]
3 AUGUST 2000

CIVIL PROCEDURE: *Pleadings - Striking out - Whether application can be made after filing of unconditional appearance - Whether provisional upon entry of conditional appearance - Whether application can be made after filing of statement of defence or close of pleadings - Rules of the High Court 1980, O. 18 r. 19*

This was an appeal from the decision of the senior assistant registrar upholding the plaintiff's preliminary objection and dismissing the defendants' application under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ('RHC'). The plaintiff's objection was that the defendants were precluded from making the application because they had already filed an unconditional appearance, or, alternatively, because they had served their statements of defence.

Held:

[1] The filing of an unconditional appearance does not preclude a defendant from making an application to strike out under O. 18 r. 19 of the RHC. On the contrary, O. 18 r. 19(1) is explicit that such an application may be made at any stage of the proceedings. The right to apply under O. 18 r. 19 of the RHC is not conditional upon the filing of a conditional appearance; in fact, an application may be made after the filing of a statement of defence or even after the pleadings are deemed to be closed.

[Appeal allowed.]

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd [1995] 1 CLJ 461 ***(not foll)***

Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme & Another Action [1987] 2 MLJ 633 ***(foll)***

Jamir Hassan v. Kang Min [1992] 2 MLJ 46 ***(foll)***

Lim Seak Huat v. Malayan United Realty Sdn Bhd [1997] 5 CLJ 336 ***(not foll)***

Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat [1999] 2 CLJ 886 ***(not foll)***
Tengku Jaafar v. Karpal Singh [1993] 4 CLJ 183 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 12 rr. 6, 7, O. 18 r. 19(1)(a), O. 33 r. 2

Other source(s) referred to:
Mallal's Supreme Court Practice, Tan Sri Datuk Chang Min Tat, 2nd edn, p 68

For the appellant - Kelvin Kong; M/s Heng & Mogan
For the respondents - Selva Balan Sinnan; M/s Azman Joseph & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Hishamudin Yunus J:

This is an appeal against the decision of the learned senior assistant registrar, High Court (Civil Division, No. 7), Kuala Lumpur. The decision was given on 28 June 2000.

In her decision, the learned senior assistant registrar dismissed an application (encl. 7) by the defendant under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 (hereinafter referred to as "the RHC"). In dismissing the application, the learned senior assistant registrar upheld the preliminary objections raised by the plaintiff at the commencement of the hearing of the application before her.

The preliminary objections were these. First, the plaintiff contended that the defendants were precluded from making the application because they had filed an unconditional appearance instead of conditional appearance.

Second, and in the alternative, it was argued on behalf of the plaintiff that, even if the fact that they had filed an unconditional appearance does not prevent the defendants from making the application to strike out, nevertheless, they were still precluded from making the application by reason of the fact that they had already, before making the application, served their statements of defence.

In the present case, the writ summons and the statement of claim were filed on 18 February 2000. The memorandum of appearance was filed on 7 March 2000. The statements of defence of the defendants were filed on 20 March 2000 and had been served.

The application that led to the present appeal was filed on 17 April 2000.

In the submission before me, the plaintiff maintains the same arguments.

Thus the first issue before me is: Are the defendants precluded from making an application under O. 18 r. 19 by reason of the fact that they had filed an unconditional appearance?

As for this first issue, the plaintiff relies on the Supreme Court judgment in *Alor Janggus Soon Seng Trading Sdn. Bhd. v. Sey Hoe Sdn. Bhd.* [1995] 1 CLJ 461, and two High Court cases, namely, *Pet Far Eastern (M) Sdn. Bhd. v. Tay Young Huat* [1999] 2 CLJ 886 and *Lim Seak Huat v. Malayan United Realty Sdn. Bhd.* [1997] 5 CLJ 336.

In rebutting the plaintiff's contention in respect of the first issue, the learned counsel for the defendants (the appellants, before me), Encik Kelvin Kong, in his argument, refers to the provision of O. 18 r. 19 which reads:

> 19. **Striking out pleadings and indorsements**
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> (1) The Court may *at any stage of the proceedings* order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court;
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
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> (2) No evidence shall be admissible on an application under paragraph (1)(a);
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> (3) This rule shall, so far as applicable, apply to an originating summons and petition as if the summons or petition, as the case may be, were a pleading. (emphasis added)

Emphasizing on the words which I have italicised ("*at any stage of the proceedings*"), the learned counsel submits that the application under O. 18 r. 19 may be made at any stage of the proceedings, meaning that it can be made at any time in the course of the proceedings, and that the filing of a conditional appearance is not a pre-condition for the making of an O. 18 r. 19 application. In other words the filing of an unconditional appearance is not a bar to the making of an application under O. 18 r. 19.

In support of his argument, the learned counsel relies on *Tengku Jaafar v. Karpal Singh* [1993] 4 CLJ 183 and *Jamir Hassan v. Kang Min* [1992] 2 MLJ 46.

I shall first consider the plaintiff's argument. In *Alor Janggus*, Jemuri Serjan CJ (Borneo) delivered the Supreme Court judgment. At p. 478 of the judgment, his lordship said:

> It was open to the defendants to resort to O. 18 r. 19 or O. 33 r. 2 of our High Court Rules 1980 but they chose not to do so but to bring up the *locus standi* issue on their application to set aside the injunction. On this ground alone this appeal should succeed. *It is too late now for the defendants to invoke O. 18 r. 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O. 18 r. 19 but it is still open to them to have recourse to O. 33 r. 2 if they are so minded* (emphasis added)

In this case, the proceeding before the High Court was in the nature of an interlocutory application by the defendants (the respondents before the Supreme Court) to set aside an *ex parte* interlocutory injunction previously granted to the plaintiffs (the appellants before the Supreme Court) to restrain the second defendant (the second respondent before the Supreme Court) from disposing off certain shares to the third defendant (the third respondent before the Supreme Court). The High Court granted the application to set aside the *ex parte* interlocutory injunction on the ground, *inter alia*, that the plaintiffs had no *locus standi* to commence the writ action against the defendants. Before the High Court, the *locus standi* issue was raised by the defendants by way of a preliminary objection at the commencement of the hearing of the application to set aside the *ex parte* interlocutory injunction.

On appeal by the plaintiffs (who then became the appellants) to the Supreme Court, the court allowed the appeal on several grounds. One of the grounds relates to procedure. The Supreme Court held that it was wrong, procedurally, for the High Court to have allowed the respondents to raise the issue of *locus standi* at the hearing of the respondents' application to set aside. The court described the procedure adopted by the High Court (that is to say, the act of allowing the issue of *locus standi* to be raised) as an "unorthodox procedure". The Supreme Court held that the correct procedure was for the respondents to raise the issue of *locus standi* by way of either an application under O. 18 r. 19 or an application under O. 33 r. 2 of the Rules of the High Court.

Subsequent to the above Supreme Court decision, in the High Court cases of *Pet Far Eastern* and *Lim Seak Huat*, both cases dealing with an application under O. 18 r. 19, Abdul Malik Ishak J adopted the above *dicta* of Jemuri Serjan CJ (Borneo) and ruled that a defendant who has entered an unconditional appearance is precluded from making an application under O. 18 r. 19. In other words, a defendant intending to make an O. 18 r. 19 application must, upon being served with the writ, file a **conditional** appearance and not an unconditional appearance. This is what the learned judge said in *Pet Far Eastern* (at p. 916):

> Finally, the issue raised by Mr. Clarence Edwin for the plaintiff in regard to the entry of an unconditional appearance must be considered by this court. The second defendant had entered an unconditional appearance and had served on the plaintiff a statement of defence and by these actions the second defendant would, *per se*, be precluded from invoking the operation of O. 18 r. 19(1) of the RHC. I have in *Lim Seak Huat v. Malayan United Realty Sdn Bhd (supra)* applied the decision of the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Seng Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 and I proceeded to say as follows:
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> > There is one other matter that should be addressed. It is this. The defendant filed their unconditional appearance on 8 May 1995 as reflected at enclosure 4. The summons-in-chambers for striking out in enclosure 11 was dated 23 June 1995 and it was filed on the same date. Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn. Bhd. & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 SC, speaking for the then Supreme Court had occasion to remark on filing an unconditional appearance in relation to an Order 18, rule 19 of the RHC's application. This was what his Lordship said:
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> > > It is too late now for the defendants to invoke Order 18, rule 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke Order 18, rule 19 but it is still open to them to have recourse to Order 33, rule 2 if they are so minded.
> >
> > Applying this short principle of law to the facts of the present case, the defendant having entered an unconditional appearance on 8 May 1995 and having filed the statement of defence on 24 May 1995 was thus prevented from filing encl. 11 on 23 June 1995.
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> That being the case the second defendant was precluded from applying under O. 18 r. 19(1) of the RHC for striking out the plaintiff's claim. Enclosure 64 must therefore die a natural death in the face of the salutary rule enunciated by the Supreme Court in *Alor Janggus*'s case. The appeal in encl. 80 should be dismissed with costs and the decision of the SAR was accordingly upheld. For my part, I look forward to the trial of this action.

With respect, I must differ. In my judgment, the filing of an unconditional appearance does not preclude a defendant from making an application under O. 18 r. 19. I find nothing in the RHC providing, either explicitly or impliedly, to that effect. On the contrary, O. 18 r. 19 expressly provides that such an application may be made at any stage of the proceeding. The words **"at any stage of the proceedings"**, to my mind, strongly imply that the right to make an application under O. 18 r. 19 is not conditional upon the filing of a conditional appearance. Such an application may be made, for example, after the filing of the statement of defence; or, even after the pleadings are deemed to be closed. Normally, a statement of defence is filed only after the filing of an unconditional memorandum of appearance; or, if a conditional appearance had been previously filed, the statement of defence is filed only after the conditional appearance has, by operation of law, become an unconditional appearance. Every conditional appearance is endorsed with the following stipulation (O. 12 r. 6 and Form 16, RHC):

> This appearance is to stand as unconditional unless the defendant applies within .. [14] ... days to set aside the writ, or service thereof and obtains an order to that effect.

I find support for the view that I hold in *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme and Another Action* [1987] 2 MLJ 633 where Zakaria Yatim J (as he then was) said (at p. 635):

> The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice 1985*, Vol. 1, p. 304.

The above decision was cited with approval and applied by Haidar J (as he then was) in *Jamir Hassan* where his lordship said (at p. 50):

> Before proceeding to consider the merits of the defendant's application under O. 18 of the RHC it would not be inappropriate perhaps to consider first the issue of delay raised by Mr. TO Thomas. It is not disputed that the defendant filed the application well after the defence and counterclaim was filed. While it may be true that in an O. 14 application, it must normally be filed before the defence is delivered, however, in an O. 18 application it would appear that there is no such constraint. Order 18 r. 19 of the RHC specifically provides 'The Court may at any stage of the proceedings order to be struck out or amended any pleading ...' (emphasis added). The issue of delay in an O. 18 application was

considered by Zakaria Yatim J in *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme and Another Action* where at p. 635 the learned judge said:

> The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice 1985*, Vol. 1, p. 304.

I also find support in *Tengku Jaafar* which, like the present case, dealt with an O. 18 r. 19 application. There, the court considered, *inter alia*, the contention by the plaintiff that the filing of an unconditional appearance precluded the defence from making an O. 18 r. 19 application. Idris J, dismissing the contention, held:

> One last submission advanced by Counsel for the plaintiff is that if the defendant chooses, as he does in his application, to strike out the writ of summons and the statement of claim he should have filed a conditional appearance; now that he has put in an unconditional appearance he is therefore barred from proceeding with the said application.
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> The effect of conditional appearance is fully explained in *Mallal's Supreme Court Practice* 2nd edn., para 12/1/3. Such an appearance reserves to the defendant "the right to apply to the Court to set aside the writ or service thereof for an alleged informality or irregularity which renders either the writ or the service invalid." The position in the instant case is different – the defendant is not challenging the validity of the writ or service thereof but proceeds on the premise that the plaintiff has no *locus standi* to bring the said suit against him, the suit is clearly scandalous, frivolous, vexatious and/or an abuse of the process of the Court as the alleged publication does not amount to defamation or sedition – the allegations do not evince any cause of action against him. In the circumstances I am satisfied that the course of action taken by the defendant is in line with O. 18 r. 19 of the Rules of the High Court 1980 and that the application is made promptly, that is, before service of the statement of defence on the plaintiff.

I shall now revert to *Alor Janggus*. In the light of the authorities and the express provision of O. 18 r. 19 itself the remark of Jemuri Serjan CJ (Borneo) in that case to the effect:

> It is too late now for the defendants to invoke Order 18, rule 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke Order 18, rule 19 but it is still open to them to have recourse to Order 33, rule 2 if they are so minded.

is, to my humble mind and with the greatest respect, rather unsettling. For

such a statement implies that an O. 18 r. 19 application can only be made if the defendant had previously filed a **conditional** appearance (as opposed to an **unconditional** appearance). In all humility, I find great difficulty in understanding this proposition. First and foremost, the learned Chief Justice (Borneo) did not explain why the Supreme Court held such a view – that the filing of an unconditional appearance precludes a defendant from making an O. 18 r. 19 application; nor were authorities cited to support the proposition. I find that there is absolutely nothing either in the provision of O. 18 r. 19 or in the provisions of O. 12 rr. 6 and 7 (the provisions dealing with conditional appearance) that stipulates or implies that such an application cannot be made once an unconditional appearance has been filed. On the contrary, such a view as expounded by the Supreme Court appears to run counter to the express provision of O. 18 r. 19 which clearly stipulates that the application may be made **at any stage of the proceedings.**

In the light of the implication of the Chief Justice's *dicta*, perhaps it might be of some relevance at this juncture to understand the meaning and purpose of a conditional appearance. According to *Mallal's Supreme Court Practice* 2nd edn. by Tan Sri Datuk Chang Min Tat at p. 68:

> **Conditional appearance, meaning of and effect of:** The term "conditional appearance" means an appearance in qualified terms, reserving to the appearing defendant the right to apply to the court to set aside the writ or service thereof for an alleged informality or irregularity which renders either the writ or the service invalid.

As to O. 12 rr. 6 and 7, these provisions read:

> 6. **Conditional appearance**
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> (1) A defendant to an action may with the leave of the Court enter a conditional appearance in Form 16 in the action.
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> (2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 7 and the Court makes an order thereunder.
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> 7. **Application to set aside writ, etc.**
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> (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the court for an order setting aside the writ or service of the writ, or any notice of the writ, on him, or declaring

a that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.

(2) An application under this rule must be made by summons.

It will be observed from these provisions that the filing of a conditional b appearance is necessary, instead of an unconditional appearance, where the defendant intends to take any one of the following steps:

(a) to apply to the court for an order setting aside the writ;

(b) to apply to the court for an order setting aside the service of the writ;

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(c) to apply to the court for an order setting aside the notice of the writ;

(d) to apply to the court for an order setting aside the service of the notice of the writ;

d (e) to apply to the court for an order declaring that the writ has not been duly served on the defendant;

(f) to apply to the court for an order declaring that the notice of the writ has not been duly served on the defendant; or

e (g) to apply to the court for an order discharging any order giving leave to serve the notice on him out of the jurisdiction.

It is very pertinent to note from the above passage of *Mallal's Supreme Court Practice* and the aforesaid analysis of rr. 6 and 7 that the provisions do not encompass or envisage an O. 18 r. 19 application. The nature of f an application under O. 12 r. 7 is not similar to that of an application under O. 18 r. 19. For one thing the former specifically refers to the **setting aside** of the **writ** while the latter specifically refers to the **striking out** of the **statement of claim** (or the **statement of defence**, as the case may). What is alleged in an O. 12 r. 7 application is the informality or g irregularity of the writ or the service of the writ. But this is not the case in an O. 18 r. 19 application. An application under O. 18 r. 19 does not attack the writ; but is directed at the statement of claim (or statement of defence, as the case may be). It is, therefore, clear that the filing of a conditional appearance has no bearing or relevance to the making of an h application under O. 18 r. 19.

In any case, as conceded by Encik Selva Balan for the plaintiff, the above brief remark by Jemuri Serjan CJ (Borneo) in *Alor Janggus* is merely an *obiter dicta*. For, in that case, whether or not the respondents could file an O. 18 r. 19 application, was not the issue before the Supreme Court.

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A mere *obiter dicta* of a higher court is not binding upon this court.

The second issue is this: Are the defendants precluded from making an application under O. 18 r. 19(1)(a) by reason of the fact that they had served their statement of defence? The learned counsel for the plaintiff submitted that they are. He cites the *dicta* of Idris J in *Tengku Jaafar* which I have quoted above but with emphasis on the following statement:

> In the circumstances I am satisfied that the course of action taken by the defendant is in line with O. 18 r. 19 of the Rules of the High Court 1980 and that the application is made promptly, that is, before service of the statement of defence on the plaintiff.

With respect, I cannot accept the contention by learned counsel that Idris J, by remarking that the application was made before the service of the statement of defence, intended to enunciate the proposition that an application under O. 18 r. 19 must be made before the service of the statement of defence. The argument of the plaintiff (opposing the application) before the learned judge, that led to the above remark, was merely that the defendant in that case was barred from proceeding with the O. 18 r. 19 application because he (just as in the case before me) had put in an unconditional appearance. The plaintiff did not make an issue of the fact that the defendant had filed a statement of defence. As I see it, the learned judge, by his remark, was only emphasising the fact that the application before him was made promptly.

However, although not referred to by learned counsel, *Mallal's Supreme Court Practice* appears to support the learned counsel's contention that the service of a statement of defence would preclude a defendant from making an O. 18 r. 19 application. For it is stated therein (at p. 226):

> **Application:** The rule states that the order may be made "at any stage of the proceedings". Still the application should be made promptly. An application to strike out a statement of claim should be made before serving the defence; ...

Be that as it may, with respect, I am unable to accept the submission of learned counsel. In view of the words "at any stage of the proceedings" in O. 18 r. 19, in my judgment, the better view would be as expressed by Zakaria Yatim J in *Bank Bumiputra Malaysia* and by Haidar J in *Jamir Hassan*, which I have referred to earlier in this judgment. Thus, the mere serving of a statement of defence is not a bar to the making of an O. 18 r. 19 application.

In conclusion, I hold in the present case that neither the filing of the unconditional appearance, nor the serving of the statements of defence, precludes the defendants from making an application under O. 18 r. 19.

Accordingly, this appeal is allowed with costs. Enclosure 7 is referred back to the senior assistant registrar for the hearing of the application.